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Proposed programme budget for the biennium 2018–2019

Request for a subvention to the Extraordinary Chambers in the Courts of Cambodia

Eighth report of the Advisory Committee on Administrative and Budgetary Questions on the proposed programme budget for the biennium 2018–2019

I. Introduction

1. The Advisory Committee on Administrative and Budgetary Questions has considered the report of the Secretary-General (A/72/341), in which he provides details on the progress achieved by the Extraordinary Chambers in the Courts of Cambodia, a projection regarding the anticipated use of the approved commitment authority for 2017 and information on the estimated budget of the Extraordinary Chambers for 2018 and 2019. The Secretary-General seeks the Assembly's approval of an appropriation for a subvention for the international component of the Extraordinary Chambers in the amount of $10.4 million for 2018. During its consideration of the report, the Committee met with representatives of the Secretary-General, who provided additional information and clarification, concluding with written responses received on 17 October 2017.

II. Background

2. In its resolution 57/228 A on the Khmer Rouge trials, the General Assembly welcomed the efforts of the Secretary-General and the Government of Cambodia towards the establishment of Extraordinary Chambers within the existing courts structure of Cambodia, with international assistance, for the prosecution of crimes committed during the period of Democratic Kampuchea. Subsequently, the Assembly approved, in its resolution 57/228 B, an agreement that regulated the cooperation between the United Nations and the Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975

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to 6 January 1979. In paragraph 3 of the resolution, the Assembly also decided that the expenses of the Extraordinary Chambers would be defrayed by the United Nations in accordance with the relevant provisions of the Agreement and would be borne by voluntary contributions from the international community.

3. In 2005, the Secretary-General reported to the General Assembly that sufficient contributions and pledges had been received to fund the international staff of the Extraordinary Chambers and their operations for a sustained period of time (A/60/565, para. 3). The above-mentioned Agreement between the United Nations and the Government of Cambodia thus entered into force on 29 April 2005. Since then, the Secretary-General has issued seven reports on the Khmer Rouge trials, in which he has provided updates on the progress achieved towards establishing and operating the Extraordinary Chambers (A/62/304, A/67/380, A/68/532, A/69/536, A/70/403, A/71/338 and A/72/341).

4. The Extraordinary Chambers comprise both national and international components that are separately financed. The Government of Cambodia is responsible for the salaries of the Cambodian judges and local personnel, while the United Nations is responsible for those of the international judges and international personnel, pursuant to articles 15 and 16 of the above-mentioned Agreement.

5. In his report of 2012 on the Khmer Rouge trials, the Secretary-General first alerted Member States to the adverse cash position and the steadily worsening financial position of the Extraordinary Chambers. At that time, he indicated that the international component faced an acute funding shortfall that could jeopardize the future operations of the Chambers (A/67/380, para. 66). In 2013, the Secretary-General informed the General Assembly that the national component was experiencing a serious shortfall in pledges for that year, creating a funding crisis of greater severity than that of the international component (A/68/532, para. 31).

6. Subsequently, following its consideration of the report of the Secretary-General and the conclusions and recommendations of the Advisory Committee thereon (see A/68/7/Add.12), the General Assembly, in its resolution 68/247 B, authorized the Secretary-General, as an exceptional measure, to enter into commitments in an amount not to exceed $15.54 million to supplement the voluntary financial resources of the international component for the period from 1 January to 31 December 2014. Those funds, however, were never drawn upon, as voluntary funding eventually covered the international component's obligations during 2014 in full.

7. In his subsequent report on the Khmer Rouge trials (A/69/536), the Secretary-General highlighted the continuing financial challenges facing both the international and national components of the Extraordinary Chambers and requested the approval of a subvention of up to $28,983,200 (comprising $23,954,400 for the international component and $5,028,800 for the national component) for the period from 1 January to 31 December 2015. By its resolution 69/274 A, the General Assembly endorsed the recommendations contained in the report of the Advisory Committee (A/69/652) and authorized the Secretary-General, as an exceptional measure, to enter into commitments in an amount not to exceed $12.1 million to supplement the voluntary financial resources of the international component of the Extraordinary Chambers for the period from 1 January to 31 December 2015.

8. In his report of 2015 (A/70/403), the Secretary-General requested the General Assembly to appropriate a subvention of $25,151,300 for the period from 1 January to 31 December 2016. In its resolution 70/248 A, the General Assembly endorsed the recommendations contained in the report of the Advisory Committee (A/70/7/Add.20) and authorized the Secretary-General, again as an exceptional measure, to enter into commitments in an amount not to exceed $12.1 million for the period from 1 January to 31 December 2016.

9. In his 2016 report (A/71/338), the Secretary-General requested the approval of a subvention of up to $16.2 million for the year 2017. By its resolution 71/272, the General Assembly endorsed the recommendation contained in the report of the Advisory Committee (A/71/550) and authorized the Secretary-General, as an exceptional measure, to enter into commitments in an amount not to exceed $11 million to supplement the voluntary financial resources of the international component of the Extraordinary Chambers for the period from 1 January to 31 December 2017.

III. Case progress and management

Completion plan

10. Periodic reports of the Secretary-General have contained details concerning the progress of cases before the Extraordinary Chambers.[1] Information on the progress made in the case files during the most recent reporting period is provided in sections I and II of the most recent report of the Secretary-General (A/72/341). The report indicates that case 002 against Nuon Chea and Khieu Samphan, has been severed into two cases: case 002/1 (crimes against humanity) and case 002/2 (genocide and other crimes). In case 002/1, the Trial Chamber pronounced its judgment on 7 August 2014. The accused were sentenced to life imprisonment; both have appealed the convictions. In November 2016, the Supreme Court Chamber delivered the judgment on appeals, confirming the charges and upholding the sentence of life imprisonment. In case 002/2, the trial commenced with opening statements on 17 October 2014, and evidentiary hearings commenced on 8 January 2015. The trial judgment is anticipated in the second quarter of 2018 (A/72/341, paras. 3 and 9–12). With regard to case 003, the conclusion of the judicial investigation against Meas Muth was notified to the parties by the international co-investigating judge in January 2017. The report also indicates that case 004 has been severed into three cases, one for each of the charged persons: Im Chaem, Ao An and Yim Tith. In February 2017, the co-investigating judges issued a joint dispositive closing order dismissing the case against Im Chaem. Subsequently, a notice of appeal against the dismissal was filed. The judicial investigations for the other two cases were concluded in December 2016 and June 2017, respectively (ibid., paras. 4 and 13-19).

11. Pursuant to the request of the General Assembly in its resolution 68/247 B for a case completion strategy along with a clear road map, the Extraordinary Chambers submitted a completion plan that details the remaining work to be completed in the proceedings of which they are currently seized. The Secretary-General indicates that, on the basis of current projections, the earliest anticipated completion of judicial proceedings in case 002 will be in the second quarter of 2018, with the delivery of a trial judgment in case 002/02, absent any appeal. The timing of the final conclusion of judicial proceedings in case 002/02 will depend on the filing of any appeal. The current projections estimate that notices of appeal and appeals against the trial judgment, if any, will be filed in the third quarter of 2018, with the judgment on these potential appeals delivered in the first quarter of 2020, bringing case 002 to a close.

12. **The Advisory Committee stresses the need to take all necessary measures to expedite case completion, including for more effective planning to meet the completion milestones, while fully respecting the judicial process (see also A/71/550, para. 10). The Committee notes the progress made in the current**

[1] See A/58/617, A/59/432 and Add.1, A/60/565, A/62/304, A/67/380, A/68/532, A/70/403 and A/71/338.

judicial proceedings and stresses again the importance of the regular updates to the comprehensive completion plan. Once again, the Committee notes that the revised plan now foresees judicial activity for several years beyond the current financial period and notes with concern the potential financial implications of the timeline.

Court management

13. In addition, the report of the Secretary-General states that in May 2017 the co-investigating judges indicated their intention to request a permanent stay on judicial proceedings in cases 003, 004 and 004/02 owing to their deep concerns about the Court's funding situation. They subsequently decided to defer the decision on a stay. Upon enquiry, the Advisory Committee was informed that, pursuant to rule 73 of the internal rules of Extraordinary Chambers, the decision of the co-investigating judges to permanently stay the proceedings may be subject to appeal to the Pre-Trial Chamber. **The Committee notes that, pursuant to paragraphs 9 and 10 of the terms and conditions of service for the judges of the Extraordinary Chambers, provided to it upon request, international judges are subject to the authority of the Secretary-General in respect of all matters of a non-judicial nature arising in connection with or related to their service.**

14. With respect to the level of the honorariums and emoluments received by the international judges of the Extraordinary Chambers who are subject to the Regulations Governing the status, Basic Rights and Duties of Officials other than Secretariat Officials and Experts on Mission, the Advisory Committee was informed, upon enquiry, that, as indicated in paragraph 20 of their terms and conditions of service, the amount of the net remuneration paid to the judges was equal to the gross (rather than net) salary of a staff member at the D-2 level, including a post adjustment component applicable to Cambodia.

15. Upon enquiry, the Committee was informed by the Executive Secretary of the International Civil Service Commission that the common system operated in reverse fashion to the outside taxpaying world. Outside of the common system, salaries were set in gross terms and taxes were deducted from gross salaries. In the common system, net pay was the starting point and staff assessment was added to net salaries. Moreover, although it was recorded in payment slips as part of gross salary, staff assessment was not provided to staff as payment, but rather was a budgeting tool. It was the net salary (plus the applicable post adjustment) that was received by staff members as their take-home pay.

16. The response further indicates that United Nations salaries are set in net terms — in reference to after-tax salaries in the comparator civil service — because the officials of the Organization are exempt from national income taxation by virtue of the Convention on the Privileges and Immunities of the United Nations (sect. 18 (b)). Where staff do have to pay national taxes (e.g. when a Member State has not ratified the Convention or did so with a reservation with regard to section 18 (b)), their tax payments are reimbursed to them by the Organization. The purpose of staff assessment is to generate budgetary resources for such reimbursements through the Tax Equalization Fund. Staff assessment is not a factor in salary comparisons or margin calculations. Accordingly, while it is an important budgetary tool that ensures pay equity among staff of different nationalities, staff assessment is irrelevant to the decisions of the General Assembly relating to setting and adjusting pay. The sub-accounts of Member States in the Tax Equalization Fund are set based on their rates of budget contributions while reimbursement payments depend on the tax regime of the State concerned and the tax deductions that staff may individually take advantage of, as well as on the number of nationals of that State in the Organization. The Committee was further informed that the United

Nations secretariat had initiated, in early 2017, a review of the terms and conditions of the international judges, which was still ongoing.

17. **The Advisory Committee recommends that the General Assembly request the Secretary-General to discontinue as soon as possible the current practice of providing the international judges with a net remuneration in the amount of a gross remuneration.**

IV. Current financial position

International component

18. The Secretary-General indicates that, despite the combined efforts of the principal donors group, the Secretariat and the Special Expert, voluntary contributions for the international component continue to decline, falling from $17.6 million in 2015 to $13.1 million in 2016 and dropping to about $10.7 million in pledges and contributions for 2017 (A/72/341, para. 28).

19. The Secretary-General also indicates that the group of interested States approved a revised budget amounting to $23.76 million (for 2017) for the international component. As at 30 June 2017, voluntary contributions of $2.34 million had been received for the international component for 2017, which, together with the drawdown of an amount of $9.97 million from the commitment authority, covered the expenditures for the first six months of 2017. To meet the operational cash flow requirements of the international component in the latter six months of 2017, a further drawdown on the commitment authority and additional voluntary contributions of $8.35 million are expected (A/72/341, para. 32).

20. The Secretary-General further indicates that, taking into account this situation, cost-saving measures have been put in place to achieve cost avoidance of at least $2 million for the international component through the freezing of recruitment against vacant posts unless absolutely necessary; cost avoidance and curtailing measures in areas such as travel, operating expenses and contractual services; and the discontinuation of contracts of standby counsel, which are no longer required based on the assessment of the Trial Chamber (A/72/341, para. 33). Upon enquiry, the Advisory Committee was informed that, as at 25 September 2017, 22 posts were vacant, including 10 posts subject to a recruitment freeze. Four of the frozen posts are proposed to be abolished in 2018. Of the remaining six frozen posts, two posts in the Supreme Court Chamber are expected to be filled at the beginning of the appeal in case 002/02. The recruitment for the Legal Officer post in the Defence Support Section, as well as three posts in the Office of Administration, would be activated only when absolutely necessary. **While welcoming the cost-saving measures taken by the Extraordinary Chambers, the Advisory Committee considers that the posts that are not required for the completion of the Extraordinary Chambers mandate should be abolished.**

National component

21. The Secretary-General indicates in his report that, in the first years of operation, the national component was funded largely by voluntary contributions, covering 80 per cent of the budget, with the remainder paid by the Government of Cambodia, which also provides in-kind contributions of buildings, facilities and local services. The contribution of the Government has increased significantly over the years and, since 2015, has covered over 60 per cent of the national component's requirements. The Secretary-General also indicates that, as at 30 June 2017, voluntary contributions and pledges of $5.84 million had been received for 2017.

Nevertheless, the shortfall of $536,700 had not been secured at the time of issuance of his report.

22. **The Advisory Committee notes the commitments made by the Government of Cambodia to meeting the terms of its Agreement with the United Nations. The Committee trusts that the Secretary-General will continue to actively engage with the relevant authorities of the Government to ensure that the obligations arising from the terms of the Agreement are met.**

V. Resource requirements and request for a subvention to the Extraordinary Chambers in the Courts of Cambodia

23. For 2018, the proposed resource requirements for the international component amount to $18,932,500, representing a decrease of $4,830,500 (or 20.3 per cent) compared with the revised budget for 2017. The resource requirements would provide for the continuation of 131 posts (12 D-2, 1 D-1, 6 P-5, 12 P-4, 30 P-3, 4 P-2, 13 Field Service, 11 National Professional Officer and 42 General Service), representing a reduction of 27 posts, and for non-post resources. As required by the General Assembly in its resolution 69/274 A, a full justification is provided for the resource requirements without prejudice to the voluntary nature of the current funding arrangements.

24. In terms of financing sought in 2018, the Secretary-General is seeking the approval of the General Assembly of an appropriation for a subvention for the international component of the Extraordinary Chambers in the amount of $10,418,800, which when combined with expected contributions amounting to $8,513,700 would provide the necessary funding for the full 2018 budget in the amount of $18,932,500 (see A/72/341, paras. 28 and 38).

25. The Secretary-General indicates in his report that he will continue intensive fundraising efforts. The requested subvention would allow the Chambers to remain operational, however, pending the receipt of the additional voluntary contributions necessary for operations throughout the year. The Secretary-General proposes that the subvention be available to be drawn upon should the extrabudgetary funds on hand be insufficient to meet the international component's staff salaries and operational costs (A/72/341, para. 38).

26. The shortfall in pledges for the international component in August 2017 amounts to $10.41 million for 2016 and $13.07 million for 2017 (A/72/341, annex, table A.3.1). Information on the financial status of both the international and national components of the Extraordinary Chambers is contained in the annex to the report of the Secretary-General.

27. **In view of the persistent funding challenges faced by the Extraordinary Chambers, the Advisory Committee trusts that the intensified fundraising efforts of the Secretary-General will yield results, including by broadening the donor base for the Chambers, so that their work can be brought to a successful conclusion.**

Other staff costs

28. According to the supplementary information provided to the Advisory Committee, an amount of $890,700 would provide for the creation of 34 general temporary assistance positions (27 in the international component and 7 in the national component) to service possible trial proceedings for cases 003 and 004 in 2018. The proposed positions would include 15 legal and administrative staff in the

trial chambers, 10 interpreters, 5 transcribers and 1 Public Information Officer for durations varying from two to eight months.

29. **The Advisory Committee encourages the Extraordinary Chambers to exercise restraint and to use external contractors and consultants judiciously without prejudice to the requisite caseload requirements for translation, transcription and interpretation. The Committee expects that the Chambers will undertake all efforts to exercise budgetary discipline and identify operational efficiencies in this regard.**

Defence support section

30. The supplementary information also indicates that a requirement of $3,263,000 for 2018–2019 would provide for the legal assistance teams for the two accused persons in case 002/02, one accused person in case 003, one accused person in case 004 and one accused person in case 004/02. For each accused, the legal assistance scheme provides a team of one international and one national co-lawyer, supported by legal consultants and a case manager. Upon enquiry, the Advisory Committee was provided with information on the standardized costs for defence counsels showing that in 2018 an amount of $460,317 would be allocated to cover the fees of the legal assistance for each of the two defendants in case 002/02, while an amount of $564,375 would provide for the legal assistance for each of the three defendants in cases 003, 004 and 004/02, respectively. **The Advisory Committee is of the view that the resources provided for the legal assistance of each of the defendants should be the same and should be adjusted to the level provided in case 002/02, which is an annual amount of $460,317 per defendant.**

Furniture and equipment

31. An amount of $253,800 is proposed under furniture and equipment in 2018. The supplementary information indicates that the requirement (totalling $401,200 for the biennium 2018–2019) would provide for software licences, replacement of computer equipment, backup solutions for Extraordinary Chambers data and upgrade of firewall software, videoconference equipment, and security and access control equipment. **The Advisory Committee notes that the requirement for furniture and equipment amounted to $210,400 in 2017. Considering that the staff complement of the Extraordinary Chambers would be reduced by 27 posts from 2017 to 2018, the Committee is of the view that the requirement for furniture and equipment in 2018 should be adjusted to the level of 2017.**

VI. Conclusions and recommendations

32. The Advisory Committee notes that, from 2005 to 2013, the Extraordinary Chambers were fully funded through voluntary contributions. As indicated in paragraph 6 above, in 2014 the General Assembly, in its resolution 68/247 B, authorized the Secretary-General, as an exceptional measure, to enter into commitments in an amount not to exceed $15.54 million to supplement the voluntary financial resources of the international component. Those funds were never drawn upon, however, given that voluntary funding eventually covered in full the obligations of the international component during 2014. For 2015 and 2016, the Assembly authorized commitments in an amount not to exceed $12.1 million for each of those two years. The Secretary-General indicates that the shortfalls for 2015 ($10,678,400) and 2016 ($10,407,700) were covered by the respective subventions. For 2017, the Assembly authorized commitments in an amount not to exceed $11 million while the shortfall is estimated at $13,074,300 (A/72/341, annex, tables A.1 and A.2).

33. **The Advisory Committee recalls that the General Assembly, in its resolution 57/228 B, decided that the expenses of the international component of the Extraordinary Chambers should be borne by voluntary contributions from the international community. Once again, the Advisory Committee notes the adverse funding situation of the Extraordinary Chambers, the persisting financial difficulties and the increasing reliance on the commitment authorized by the General Assembly. In this regard, the Committee recalls resolutions 69/274 A, 70/248 A and 71/272, by which the Assembly encouraged all Member States to provide voluntary support for both the international and national components of the Chambers and requested the Secretary-General to continue his intensive efforts to obtain additional voluntary contributions.**

34. **Furthermore, the Advisory Committee again notes that, after five consecutive requests since 2013 for subventions to support the international component of the Extraordinary Chambers, the practice is in fact no longer exceptional in nature. Nevertheless, the Committee considers that voluntary contributions should remain the major source of funding for the Extraordinary Chambers and that continued reliance on the subvention should be avoided.**

35. **The Committee therefore again reaffirms its view that a decision to appropriate an amount of the budget of the international component for 2018 would undermine the voluntary nature of the current funding arrangements and related fundraising efforts. Nonetheless, in view of the projected funding shortfall in the international component for 2018, the fluid nature of outstanding pledges and commitments and the need to ensure the continued operations of the Extraordinary Chambers, the Advisory Committee recommends that the General Assembly authorize the Secretary-General to enter into commitments in an amount not to exceed $8 million to supplement the voluntary financial resources of the international component for the period from 1 January to 31 December 2018 as a bridging financing mechanism, in lieu of an appropriation. The Committee also recommends that the Assembly request the Secretary-General to report on the use of the commitment authority to the Assembly during the main part of its seventy-third session.**

36. **The Advisory Committee continues to stress that its recommendations are made on the basis that:**

(a) **The Secretary-General engages in all efforts to increase the level of voluntary contributions (see para. 25 above);**

(b) **Should voluntary contributions be received in excess of the remaining requirements for the Extraordinary Chambers for 2018, any regular budget funds provided to the Chambers for this period would be refunded to the United Nations;**

(c) **Appropriate measures for achieving operational savings and efficiencies in the Extraordinary Chambers are in place (see paras. 26 to 29 above);**

(d) **The Chambers engage in all efforts to expeditiously complete the Court's mandate;**

(e) **Appropriate monitoring and reporting arrangements are in place to ensure an incremental release of funds to the Extraordinary Chambers, based on its monthly cash position;**

(f) **The Secretary-General continues his efforts to ensure that the terms of the Agreement between the Government of Cambodia and the United Nations are observed.**